

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 30, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 99-0498**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**COUNTY OF BUFFALO,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STEVEN R. THEURER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Buffalo County:  
DANE F. MOREY, Judge. *Reversed and cause remanded with directions.*

MYSE, P.J. Steven R. Theurer appeals a conviction for first offense operating a motor vehicle with a prohibited alcohol concentration following a jury trial. Theurer contends that the trial court erred by excluding evidence offered by an expert witness that the Intoxilyzer used to test Theurer exhibited previous problems. Theurer contends that this information was relevant to the Intoxilyzer's reliability, bringing into question whether the Intoxilyzer was

in proper working order. This would require the County to demonstrate that the machine's results were reliable and that the Intoxilyzer used was functioning properly. Theurer contends that the exclusion of this evidence deprived him of his constitutional right to present a defense. Because this court concludes that the information excluded was relevant and that the exclusion was not harmless error, the judgment of conviction is reversed and the matter is remanded to the trial court.

The evidence excluded by the trial court involved Mary McMurray's expert testimony concerning information contained in a data bank about the historical performance of all Intoxilyzer 5000 machines, and specifically the machine used to test Theurer's breath. McMurray sought to testify that the machine in question had previously failed two air blank tests on the morning of the day the machine was used to test Theurer. The information also disclosed that the machine had other difficulties such as radio frequency interference and calibration check problems in the months immediately preceding the date of Theurer's testing. While McMurray could not specify the basis of the problems noted in the data bank, the information disclosed a history of problems with the machine in question. The circuit court excluded this evidence based upon its conclusion that it was not relevant and that it would mislead the jury.

Questions regarding the admissibility of evidence are submitted to the trial court's exercise of sound discretion. Section 907.01, STATS.; *State v. Patino*, 177 Wis.2d 348, 362, 502 N.W.2d 601, 616 (Ct. App. 1993). If a trial court properly applies the law and reaches a reasoned decision, the discretionary determinations will be sustained upon appeal. *Sielaff v. Milwaukee County*, 200 Wis.2d 105, 109, 546 N.W.2d 173, 175 (Ct. App. 1996). If, however, the trial court's exercise of discretion is based upon a misapplication of the law, or the

application of a wrong legal standard, the trial court's exercise of discretion will be deemed erroneous. *State v. Tarantino*, 157 Wis.2d 199, 207-08, 458 N.W.2d 582, 585 (Ct. App. 1990).

The trial court excluded the evidence regarding the history of the functioning of the machine used to test Theurer based upon its conclusion that the information was irrelevant. This court disagrees. The statute provides for a presumption of regularity. Section 885.235, STATS.; *State v. Walstad*, 119 Wis.2d 483, 522-23, 351 N.W.2d 469, 489 (1984). The County, however, is required to demonstrate that the Intoxilyzer was in proper working order and it was correctly operated by a qualified person. WIS JI—CRIMINAL 2668. Evidence of previous malfunctions are directly related to the issue as to the machine's proper functioning. The evidence sought to be introduced related to problems that occurred on the day Theurer was tested and the months immediately preceding that date. This is evidence that directly relates to whether the machine was properly functioning at the time it was used to test Theurer. Relevant evidence is evidence that has a tendency to make a fact in issue more or less probable. Section 904.01, STATS. Malfunctioning of the machine in the immediate past is relevant as to whether the machine was properly operating at the time it was used to test Theurer. The excluded evidence is therefore relevant and the trial court's conclusion that it was not is erroneous.

This court recognizes that the evidence standing alone does not demonstrate that the Intoxilyzer 5000 was not in proper working order. In addition, the test of the machine at the time Theurer was tested evinced a machine in proper working condition. Nonetheless, the proper functioning of the machine in question can be raised by Theurer, and the history of the machine's malfunction is one way in which he may bring into issue the reliability of the equipment used

to administer a blood alcohol test. The County in response to this information could properly demonstrate that the machine was in proper working order at the time it was used to test Theurer's breath. The jury could conclude based upon the evidence before it that the machine was properly working at the time it was used to test Theurer. However, these facts are insufficient to declare that the history of a machine's malfunctioning is irrelevant, even if the reasons for the malfunctions cannot be identified by the expert.

The error is not harmless. It is up to the jury to determine the reliability of the machine in question based upon the evidence presented to it by the defendant and the County. To exclude this evidence is to eliminate any possibility of raising a question as to the machine's performance reliability based upon history of past problems. A defendant has no other basis upon which to challenge the machine's reliability. The reliability of the machine is a critical issue that may be raised in defense. The only way of bringing the machine's reliability before the jury is to use the data as pertaining to its performance over the course of the recent past. Malfunctions of the machine may be considered by the jury in their determination as to whether the machine was properly operating. The County may bring in additional evidence in support of the machine's reliability in response to such a challenge or may rely solely upon the test performed immediately prior to the administration of the test to the defendant. In any event, this evidence is sufficient to raise a question for the jury as to the reliability of the machine. This court must therefore conclude that the exclusion of this evidence was not harmless error.

Based upon this court's conclusion that the evidence sought to be offered was relevant to a material issue, Theurer's conviction must be reversed. The matter is remanded for a new trial consistent with this opinion.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

